

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

WILLIAM BARNES, et al.	:	CIVIL ACTION
	:	
V.	:	
	:	
THE AMERICAN TOBACCO COMPANY,	:	
INC., et al.	:	NO. 96-5903
Newcomer, J.		July , 1997

**M E M O R A N D U M**

Presently before this Court are defendants' Motion to Compel Plaintiffs to Submit to Psychiatric Examinations, and plaintiffs' response thereto, and defendants' reply thereto. For the following reasons, the Court grants in part and denies in part defendants' motion.

**I. Introduction**

Defendants presently move to compel plaintiffs to submit to psychiatric examinations and testing pursuant to Rule 35 of the Federal Rules of Civil Procedure. Defendants have retained Timothy J. Michals, M.D., for the purpose of assessing plaintiffs' claims of addiction to nicotine. Dr. Michals is a board certified psychiatrist and forensic psychiatrist who presently serves as Director of Jefferson Medical College's Department of Forensic Psychiatry. To assist in his assessment, Dr. Michals has asked for an opportunity to conduct psychiatric examinations of each plaintiff. Each examination would include smoking, medical and social histories from the plaintiff, a mental status evaluation, and administration of the Minnesota Multiphasic Personality Inventory-2 ("MMPI-2"). The MMPI-2 is an objective psychological test providing information concerning personality traits and

emotional conditions, which would be considered by Dr. Michals together with the plaintiff's history and clinical findings.

Defendants contend that plaintiffs' claims of "addiction" place their psychiatric conditions directly "in controversy," and that "good cause" for the psychiatric examinations has been set forth because plaintiffs' allegations of addiction constitute a fundamental basis of their claim for relief. Defendants also claim that a "good cause" finding is further supported by plaintiffs' intent to support their claims of addiction through their own expert testimony. Finally, defendants assert that these proposed examinations would not work any harm or impose any undue burden on the plaintiffs.

Plaintiffs rejoin that defendants should not be permitted to conduct the proposed examinations because the requirements of Fed. R. Civ. P. 35(a) have not been satisfied. Specifically, plaintiffs argue that the mental condition of the plaintiffs is not "in controversy" under the allegations of the Second Amended Complaint. Plaintiffs contend that the Second Amended Complaint's only claim – medical monitoring – does not have a "psychiatric or psychological component." Plaintiffs also note that there is no mention of either "personality traits" and "emotional disorders" in the Second Amended Complaint. Further, plaintiffs contend that none of the information in their own expert reports indicate that the "mental condition" of the plaintiffs is at issue. As such, plaintiffs conclude that the mental condition of the plaintiffs has not been placed in controversy. Finally, plaintiffs contend that

defendants cannot justify these proposed examinations unless they can show a "specific logical connection between: (a) that portion of the DSM-IV which relates to nicotine dependence; (b) the type of relief sought in this lawsuit (medical monitoring for latent diseases); and (c) the MMPI." Based on these grounds, plaintiffs request that defendants' motion be denied. For following reasons, the Court will grant in part and deny in part defendants' motion.

## II. Discussion

Under Federal Rule of Civil Procedure 35, the court may order a party to submit to a mental examination only if that party's mental condition is "in controversy," and the movant has shown "good cause" for the person to be examined. In Schlagenhauf v. Holder, 379 U.S. 104, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964), the Supreme Court noted that the "in controversy" and "good cause" requirements:

are not met by mere conclusory allegations of the pleadings—nor by mere relevance to the case—but require an affirmative showing by the movant that each condition as to which an examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination.

Id. at 118, 85 S. Ct. at 242-43. The ability of the moving party to obtain the information sought by other means is relevant to this determination. Id. at 118, 85 S. Ct. at 243.

The first question which this Court must resolve is whether plaintiffs have placed their mental condition "in controversy" as required by Federal Rule of Civil Procedure 35(a). As noted by Judge Gawthrop in Smith v. J.I. Case Corp., 163 F.R.D.

229 (E.D. Pa. 1995), courts have generally allowed medical examinations when:

1) there is a separate tort claim for emotional distress, 2) the plaintiff alleges that he suffers from a severe ongoing mental injury or a psychiatric disorder, 3) the plaintiff will offer expert testimony to support the claim, or 4) the plaintiff concedes his mental condition is in controversy.

Id. at 230 (citing Turner v. Imperial Stores, 161 F.R.D. 89, 95-96 (S.D. Cal. 1995); Bridges v. Eastman Kodak Co., 850 F. Supp. 216 (S.D.N.Y. 1994)). A close review of the instant case demonstrates that this case does not exactly fit into any of the above-listed categories. Instead, this case presents a unique set of circumstances upon which the Court must determine whether plaintiffs have placed their mental condition in controversy.

Although plaintiffs do not assert claims of damages for "emotional distress" or psychological injury, and their claim of medical monitoring does not have a psychiatric or psychological component, the Court finds that plaintiffs' underlying legal theory continues to place in controversy the basic factual question as to whether plaintiffs are "addicted" or "nicotine dependent."<sup>1</sup> While the Second Amended Complaint eliminates certain theories of recovery and requested relief, plaintiffs continue to premise their claim for medical monitoring on allegations of addiction to nicotine. Despite plaintiffs' protestations to the contrary, plaintiffs expressly acknowledge in their opposition brief that

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<sup>1</sup>Although these terms may not be used interchangeably in a purely medical context, the Court will interchangeably use these terms for the purposes of this order.

their alleged right to medical monitoring is "supported" by their claim of "addiction." In order to prove that their smoking was involuntary, plaintiffs must attempt to prove that they were addicted to the cigarettes they smoked. Indeed, plaintiffs have served upon defendants expert reports wherein their experts opine that plaintiffs are addicted to cigarette smoking. Therefore, it is quite clear to this Court that the factual issue of whether plaintiffs were and still are addicted to cigarettes remains very much alive in this case.

Because plaintiffs' underlying legal theory continues to involve the basic factual question as to whether plaintiffs are addicted or nicotine dependent, the Court finds that plaintiffs have placed in controversy their mental condition. This finding is based on the opinion of defendants' and plaintiffs' experts that there exists a multitude of psychological and behavioral factors which may explain a particular individual's smoking behavior and which must be assessed in response to a claim of "addiction." In this regard, defendants' expert, Dr. Harold I. Schwartz, M.D., has observed that the factors relevant to the assessment of plaintiffs' claims are many and varied, including such attributes as motivation, impulsiveness, belief in self-efficacy, responsiveness to authority figures such as physicians, the tendency to mischaracterize advice from authority figures through psychological mechanisms such as denial, and whether an individual accepts responsibility or tends toward the defense mechanism of projecting responsibility to others, thereby failing "to take charge of one's

own behavior." (Dep. Schwartz at 94-95, 112-13, 133-35). Based on these observations, it certainly appears that an assessment of plaintiffs' motivation and any other psychiatric issues impacting on the reasons for their continued smoking is material to the determination of whether plaintiffs are entitled to any relief.

Indeed, Dr. John Russell Hughes, one of plaintiffs' experts in the Castano litigation, has testified that clinical psychologists or psychiatrists are in the best position to assess the extent to which an individual's control has been impaired as a consequence of drug dependence. Defendants' experts similarly agree with this conclusion reached by Dr. Hughes. Thus, it appears beyond all doubt that the mental condition of plaintiffs has been placed in controversy by plaintiff's claim that they are addicted to cigarettes.

With respect to the "good cause" requirement of Fed. R. Civ. P. 35(a), the Court finds that defendants have also satisfied this element. Dr. Michals' requested examinations relate to a controverted factual issue which is central to whether plaintiffs are entitled to relief. If Dr. Michals is unable to conduct psychiatric examinations of plaintiffs, defendants' expert would be deprived of what is widely perceived as a useful and important tool in the assessment of a claim of addiction. Absent individual examinations of the plaintiffs, defendants will face the possibility of serious prejudice in their ability to rebut plaintiffs' claims through expert testimony. Based on these observations alone, the Court would be justified in finding that

defendants have demonstrated "good cause."

However, a "good cause" finding is further supported by plaintiffs' intent to prove their claims of addiction through their own expert testimony. See Duncan v. Upjohn, Co., 155 F.R.D. 23, 25 (D. Conn. 1994). As the Duncan court observed, where the "plaintiff intends to prove his claim at trial through the testimony of his own expert witnesses, [this] constitutes good cause for permitting the defendant to conduct its own psychiatric examination of the plaintiff." Id. In this case, plaintiffs have indicated that they will attempt to prove that they were addicted through the use of expert testimony; thus, defendants should be able to rebut such testimony through its own examination of plaintiffs by experts.<sup>2</sup> The Court thus concludes that defendants have demonstrated "good cause" as required by Rule 35(a).

Although the Court has found that defendants are entitled to have plaintiffs submit to psychiatric examinations, the Court will limit these examinations to include only a mental status evaluation and the administration of the MMPI-2. These examinations will not include a history of the plaintiffs' smoking

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<sup>2</sup>Plaintiffs attempt to limit the type of examination that defendants can conduct by arguing that although their experts opine that plaintiffs are addicted, their reports are not based on the type of examinations requested by defendants. In essence, plaintiffs seem to argue that defendants are only entitled to offer expert reports that are based on examinations that are similar to the examinations they conducted. The Court rejects this argument. As long as addiction is an issue in this case, defendants should be permitted to discover information that is relevant to this issue by any means that are justified by the circumstances of the case.

behavior and their medical and social history because these areas have been previously examined during the course of this litigation. In addition, the Court orders that these examinations will not exceed three hours in duration.

### III. Conclusion

Accordingly, for the foregoing reasons, the Court grants in part and denies in part defendants' motion to compel plaintiffs to submit to psychiatric examinations.

An appropriate Order follows.

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Clarence C. Newcomer, J.

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O R D E R

AND NOW, this        day of July, 1997, upon consideration of defendants' Motion to Compel Plaintiffs to Submit to Psychiatric Examinations, and plaintiffs' response thereto, and defendants' reply thereto, it is hereby ORDERED that said Motion is GRANTED in part and DENIED in part.

IT IS FURTHER ORDERED that each plaintiff shall submit to examination by Timothy J. Michals, M.D., at times and dates to which the parties may mutually agree or the Court may order in the absence of an agreement, at his offices located at 125 South Street, Suite 1003, Philadelphia, Pennsylvania. Each examination will include a mental status evaluation and psychological testing utilizing the Minnesota Multiphasic Personality Inventory-2. Each plaintiff's examination shall not exceed three hours in length.

AND IT IS SO ORDERED.

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Clarence C. Newcomer, J.